No. 16171

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHEW WING LUK,

Appellant,

vs.

JOHN FOSTER DULLES, as United States Secretary of State,

Appellee.

APPELLEE'S BRIEF.

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Jurisdiction.

Appellant initiated this action in the United States District Court for the Northern District of California. Jurisdiction was invoked pursuant to section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A., 1942 ed., 903, sections 1331 and 2201, Title 28, U.S.C.A., and the court's general equitable powers. [Tr. 4.] Subsequently, appellant transferred his suit to the United States District Court for the Southern District of California and filed an amended complaint in which jurisdiction was based solely on section 503 of the Nationality Act of 1940. [Tr. 11.]

It is appellee's position that the court below was correct in holding that it did not have jurisdiction over the subject matter of the complaint, *i.e.*, the power to determine whether or not appellant is a citizen of the United States.

Statutes Involved.

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A., 1942 ed., 903, provides in pertinent part:

> Sec. 503. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such department or agency . . . for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing, a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such a certificate upon the condition that he shall be subject to deportation in case it shall be decided by the Court that he is not a national of the United States. . . . from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, . . .

Section 360(a) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U.S.C.A., 1503(a), provides:

> Section 360(a). If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privi-

lege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and, jurisdiction over such officials in such cases is conferred upon those courts.

Statement of the Case.

Appellant presented his application for an American passport to the American Consul General in Hong Kong on February 2, 1951. In that application he claimed American nationality through an alleged father, native-born Chew Tai Kam. In an affidavit attached thereto appellant stated that he had an aunt residing in the United States by the name of Chew Fong Shew. After processing these facts, the Consul concluded that they were not true and the passport application was denied.

On June 28, 1951, a complaint was filed on appellant's behalf by his next friend, Chew Fong Shew, setting forth the same facts that were disbelieved by the Consul and

asking for a judicial declaration of appellant's citizenship. On November 6, 1951, appellant secured a certificate of identity from the Secretary of State for the sole purpose of allowing him to come to the United States to prove the factual basis of his claim of citizenship and thereby establish his right to an American passport. The certificate was granted on the ground that appellant's allegations set forth a "substantial basis" for his claim of American nationality.

Once before the United States District Court, however, appellant amended his complaint to state an entirely different factual basis for his alleged nationality. In the amended complaint he admitted that he is not the son of Shew Tai Kam. Instead he claimed nationality through an alleged mother, native born Chew Fong Shew, as her illegitimate son.

The District Court held that it did not have jurisdiction over the subject matter of the action because appellant's claim had never been presented to any department or agency of the federal government, *i.e.*, that appellant had not been denied a right of a national by a department or agency of the government as required by section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A., 1942 ed., 903.

The sole question presented by this appeal is whether or not the District Court erred in dismissing the complaint on the ground that it did not have jurisdiction to determine appellant's citizenship.

ARGUMENT.

I.

Appellant May Not Institute an Action Against the Secretary of State Until the State Department or Some Other Branch of the Federal Government Has Had an Opportunity to Pass on the Validity of His Claim.

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A., 1942 ed., 903, expressly allows any person to institute an action against the head of a federal department or agency for a judgment declaring him to be a national of the United States, if:

(1) he has claimed some right or privilege as a national, and

(2) a department or agency of the federal government has denied him such right or privilege on the ground that he is not a national of the United States.

Appellant claimed the right to travel as an American. The American Consul in Hong Kong denied him that right on the ground that he did not believe the information appellant gave in his passport application to show his American nationality. Appellant now admits that the information which he gave the Consul was false and that the information upon which he now relies to show his nationality has never been presented to a representative of the government. Nonetheless, appellant insists that the Consul's initial denial justifies the court's taking jurisdiction under section 503. He asserts on page 7 of his brief that "jurisdiction is not based upon the reason for

the denial" but rather "upon the Consul's denial" *per se.* Implicit, however, in that section's express requirement that a claim be denied by a federal department or agency is the additional requirement that such department or agency be given the opportunity to pass on the validity of the claim.

Appellant's literal interpretation of section 503 is unreasonable. It would enable a person to satisfy the jurisdictional prerequisite of a "denial" if he entered a consulate, claimed he was an American national, asked for a passport, but refused to fill out the required form or to give information asked thereon. If such a person was told that since he had not shown that he was a national he could not have a passport, there would in a sense be a "denial." But Congress certainly did not intend that the section be so mechanically interpreted. It seems clear that the courts would hold that the applicant in the supposed case was not entitled to a judicial ruling until the substance of his claim of nationality had at least been presented to some department or agency of the federal government.

In *Garcia v. Brownell,* 236 F. 2d 356 (9th Cir., 1956) this Court rejected the mechanical reading of section 503 now urged by appellant. In that case the appellant had been denied the right to re-enter the United States after a trip to Mexico. Seven months after the initial denial, he again presented himself at the port of entry and was allowed to re-enter. This Court dismissed his petition for a declaration of citizenship brought pursuant to section

503 on the ground that the "denial" upon which he relied has expired.

> [A] controversy once existed between appellant appellees. It has long ago been resolved insofar as that particular dispute and the claimed denial of a citizen's right are concerned.

As in the case supposed above, Garcia was able to show a denial of a right. But this Court was not willing to rip the "denial" out of context and treat the jurisdictional requirements of section 503 as a mechanical formula, *i.e.,* claim of right plus denial thereof. Therefore, it refused to take jurisdiction because after Garcia abandoned his first attempt to re-enter and the immigration authorities permitted him to enter on his second attempt "that particular dispute" had been resolved.

Just as in the supposed case and in the *Garcia* case appellant can point to a "denial" of a right. However, when he abandoned his initial grounds for claiming American nationality, "that particular dispute" which arose as to the validity of those grounds was resolved. At present it is impossible to prophesy whether a second dispute will arise concerning the validity of appellant's present position. Until some department or agency of the federal government has been given the opportunity to pass on appellant's allegations, it cannot be said in any realistc sense that appellant has suffered a "denial" of a right for the purposes of section 503 of the Nationality Act of 1940.

This interpretation of section 503 is further supported by legislative history. The Nationality Act of 1940 was

the culmination of five years of work by a committee formed in the House of Representatives. Its purpose was to codify the nationality laws and to tighten the law which enabled persons to hold dual citizenship thus escaping responsibilities to this government. Originally, section 503 was not a part of the Act. It was an amendment talked on by the Senate. Explaining this addition to the House of Representatives, Mr. Rees of Kansas, a chairman of the drafting committee stated:

> We have a new situation here, and that is, we are cutting off the claim of citizenship of these thousands of persons under this provision of the bill who do not comply with its terms and therefore it is deemed advisable that some chance be given them to have what might be their day in court . . . It was my contention when this measure was up for consideration in the committee that such people did have the right to go into court either on a declaratory judgment or under a writ of habeas corpus, but there was a feeling on the part of others that they may not have that right. Hearings on H. R. 9980, 76th Cong., 3d Sess., 86 Cong. Rec. 13247.

The discussion of section 503 in the House of Representatives indicates that neither its proponents or opponents intended that the federal courts pass on the validity of a claim of nationality before it was presented to a department or agency of the federal government. In further explaining the added section, Mr. Rees stated:

> [Nationals] are persons who owe allegiance to the Government of the United States. We say that if those persons attempt to come back, if they are turned down by the diplomatic representatives of our country abroad, if they are still able to give a substantial reason why they should be admitted as citi-

zens of the United States, and if the Department of State believes there is a substantial reason for doing so, that person may come to this country for the purpose of bringing an action in Court and being heard in this court. . . . *ibid.* 13248.

Mr. Jenkins of Ohio inquired:

. . . We used to say these fellows who are away from here have no right in our courts. But here is a man who has never been here and he has the right to file petition in the United States Court demanding a certificate that he is an American national, and he may use it.

. . . Do you make him establish the fact that he is a national and that he is what he claims to be before he can masquerade all over Europe with a certificate from an American consul saying he is something he is not? . . . *ibid.* 13248.

Mr. Rees replied:

Under the present law the individual, the gentleman from Ohio is talking about, does not have to go through any process at all. If he is still a citizen of the United States, even though born abroad, he does not have to go through any process at all. In this Act we put the burden of proof upon that individual to show that he is a citizen or a national of the United States. Along with that, we have guarded the thing further. After placing power and authority in the hands of the State Department, we give him, as I tried to explain a few moments ago, a day in court. *Ibid.,* 13248.

Only if the "[claimants] are turned down by the diplomatic representatives of our country abroad" and "if they are still able to give a substantial reason why they should be admitted as citizens of the United States" and "if the

Department of State believes there is a substantial reason" may they turn to the courts. Not until the State Department has exercised the "power and authority" vested in it by Congress does the applicant have the right to enter court. It is obvious in this case that the State Department has not exercised its "power and authority" to determine whether or not appellant's present claim "has a substantial basis."

II.

Refusal of Jurisdiction by the District Court Places No Hardship Upon Appellant.

Appellant incorrectly contends that he will be subjected to great hardship if the decision below is sustained. Contrary to the assertion on page 7 of his brief, it is not necessary for him to return to China to obtain an administrative ruling on his claim of American nationality. Various alternatives are available to appellant.

First, he can do nothing and wait until the Immigration and Naturalization Service initiates proceedings to determine his deportability. When the order to show cause why he should not be deported is issued, appellant can set forth the facts he relies upon in his amended complaint. If his claim of nationality is rejected by the immigration authorities, appellant may bring an action under section 360 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1503(a)) the successor to section 503 of the Nationality Act of 1940, or section 10 of the Administrative Procedure Act (5 U.S.C. 1009). In either instance he would be entitled to a *de novo* trial on the issue of his nationality. *Frank v. Rogers,* 253 F. 2d 889 (C.A. D.C. 1958); *Delmore v. Brownell,* 236 F. 2d 598 (2d Cir., 1956).

Second, appellant can apply for a passport immediately, setting forth the facts upon which he predicates his nationality. If the State Department denies him a passport on the ground that he is not a national, appellant would again satisfy the requirements of section 360 of the Immigration and Nationality Act of 1952, and thus be entitled to a judicial declaration of his nationality. *Jew May Lune v. Dulles,* 226 F. 2d 796 (9th Cir., 1955).

It should be noted that it lies to appellant's advantage for at least two reasons to have an administrative ruling prior to his entering court. First, he is present in the United States and thus guaranteed the judicial remedies mentioned above in the event that his claim is adversely determined by a federal department or agency. *Jiminez v. Glover,* 255 F. 2d 54 (1st Cir., 1958); *Strupp v. Dulles,* 258 F. 2d 622 (2d Cir., 1958). Thus he is given a double chance to prove his nationality. Second, in the administrative proceeding he will not be hindered by the technical rules of evidence and procedure that govern judicial proceedings. *Wallace Corp. v. N.L.R.B.,* 323 U. S. 248, 253 (1944), reh. den. 324 U. S. 885; *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division,* 312 U. S. 126, 155 (1941). Thus he may bring in all relevant evidence to prove his claim in an investigative rather than an adversarial atmosphere.

III.

Since Appellant's Claim May Be Upheld if Passed Upon by a Federal Agency, the Court Should Not Be Prematurely Burdened With This Matter.

Appellant maintains that he is an American national by virtue of being the illigitimate son of Chew Fong Shew who was born in this country. If in fact Chew Fong Shew is native born and is his mother, appellant is en-

titled to a passport and to all other rights enjoyed by American nationals. However, no representative of the federal government has ever been given the opportunity to pass upon the validity of appellant's allegations. Until such time as a federal agency has been presented with his claim neither he nor the court should speculate as to the conclusion that might then be reached.

The doctrine is well established that courts will not intervene and grant judicial relief for supposed or threatened injury until the prescribed administrative action has been taken.

In *Eccles v. Peoples Bank of Lakewood,* 333 U. S. 426, 431 and 434 (1947), the Supreme Court stated:

> A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. [Citations.] It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. *Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.*
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> * * * * * * * *
>
> Where administrative intention is expressed but has not yet come to fruition (*Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 324), *or where that intention is unknown* (*Great Atlantic & Pacific Tea Co. v. Grosjean,* 301 U. S. 412, 429-30), we have held that the controversy is not yet ripe for equitable intervention. (Emphasis supplied.)

In the *Garcia* case, discussed above, this Court dismissed a petition for declaration of citizenship on the ground that

the appellant had not set forth any presently existing controversy, stating:

> Both Statutes [Section 503 of the Nationality Act of 1940 and the Declaratory Judgments Act, 28 USC 2201] relied upon by petitioner are in their nature declaratory relief laws. It has always been, and now is, essential to the maintenance of a declaratory relief action that there be an actual controversy in existence. . . . *Mere possibility, even probability, that a person may in the future be adversely affected by official acts* not yet threatened does not create an "actual controversy" which is a prerequisite created by the clear language of the statute if it is to maintain an action under Section 2201, Title 28, U.S.C.A. Neither does it create a denial of a right or privilege as a National of the United States which is a condition for bringing the action under Section 503 of the Nationality Act of 1940. (Emphasis supplied.)

This Court did not feel that the possibility that Garcia might encounter difficulties on future trips to Mexico (and he had a history of such difficulties prior to the action) justified its assuming jurisdiction. Similarly in this case, the possibility that appellant might fail to establish his claim of nationality when he presents it to a federal agency does not warrant the court's assuming jurisdiction at this stage of proceedings. It is altogether possible that when appellant presents his claim to the Immigration authorities or to the State Department, it will be upheld as meritorious. And if appellant administratively establishes that he is a national of the United States, it will not be necessary for him to seek judicial remedies. In such event the court would be relieved of the burdensome task of conducting a *de novo* trial on the issue of appellant's nationality. Since this procedure imposes no hardship on appellant, no

equitable reason exists for allowing him to skip the administrative step. On the other hand, strong policy reasons exist for requiring appellant to obtain a ruling on his claim by some department of the federal government before burdening the courts.

Conclusion.

It is respectfully submitted that the decision of the District Court, dismissing the complaint for lack of jurisdiction over the subject matter, be affirmed.

Respectfully submitted,

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